IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-5280

PRINCE ERIC FULLER,

Appellant,

v.

STATE OF OREGON,

Appellee.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OR OREGON

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association is an organization composed of over 1,000 legal aid and defender offices in the United States. Founded in 1911, it includes over 3,500 individual and professional members, including appointed counsel, members of the retained bar, and community leaders from all walks of life. Its main concern is extending and guaranteeing legal services to the poor.

NLADA is opposed to the statutory scheme in the State of Oregon and believes that it creates an intolerable burden on the exercise of the Sixth Amendment right to counsel in that it puts a price tag on justice. For that reason it seeks to file this brief on behalf of the appellant in the instant case.

NLADA files this Brief Amicus Curiae pursuant to Supreme Court Rule 42(2). The written consent of counsel for all parties is attached hereto.

OPINION BELOW

The decision of the Court of Appeals of the State of Oregon in this case is reported at 96 OR Adv Sh 457, 504 P2d 1393 (1973).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

A petition for writ of certiorari was filed in this Court on August 15, 1973, and was granted on December 17, 1973.

QUESTION INVOLVED

Whether charging costs of appointed counsel for indigents as a condition of probation violates the accused's right to counsel, to a jury trial, to due process and equal protection of law.

STATUTORY PROVISIONS INVOLVED

This case involved the Sixth and Fourteenth Amendments to the United States Constitution. The Oregon statutes involved are ORS 161.665 and ORS 161.675.

STATEMENT OF THE CASE

Amicus adopts appellant's statement of the case.

ARGUMENT

I. THE OREGON PRACTICE OF CHARGING ATTORNEYS' FEES AS A CONDITION OF PROBATION IS CONTRARY TO THE RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. ORS 161.665 and ORS 161.675 Constitute an Impediment To the Right To Counsel

Financial penalties are imposed against law violators as a method of deterring future criminal conduct. This is a generally accepted practice. The Oregon practice has the effect of placing a financial penalty upon those defendants who seek legal assistance, but cannot afford to retain counsel.

Knowledge that an accused may be charged for appointed counsel tends to discourage indigents seeking representation. A condition of probation that requires the defendant to reimburse the government for court-appointed counsel acts as a deterrent to persons seeking counsel. Such a situation arose in *In Re Allen*, 71 Cal 2d 388:

> ". . . We believe that as knowledge of this practice has grown and continued to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant

of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the court in *Gideon, supra.*" (Allen, supra, p. 391)

"The fact that such knowledge might deter her, and could well deter others, gives rise to our concern as to the validity of such a condition of probation. The government is without constitutional authorization to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use." (*Allen, supra,* p. 391).

"We conclude that the imposition of the condition under attack constitutes an impediment to the free exercise of a right guaranteed by the Sixth Amendment to the Constitution and as with respect to other impediments or forms of compulsion against the exercise of such rights may not be permitted by the courts." (*Allen, supra,* p. 392)

"It would appear utterly inconsistent to advise a defendant of his entitlement of the free services of counsel and later exact repayment through the medium of a condition of probation. *Miranda* made clear that where 'rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.'" (*Allen, supra,* p. 393)

The American Bar Association Project on Minimum Standards for Criminal Justice discussed the same situation in its Standards Relating to "Providing Defense Services at page 58:

> "Reimbursement of counsel or the organization or governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility."

The commentary following 6.4 also agreed that reimbursement discourages the acceptance of counsel. The commentary not only called attention to the lack of wisdom of such practice. It pointed out, "The practice raises serious constitutional questions: Whether due process is denied if the accused is compelled to pay after having been acquitted or if he is not informed of his obligation at the time that counsel is provided, whether a waiver of counsel is valid if it is made because of the accused's unwillingness to undertake such an obligation, whether conditioning probation on such payments amounts to imprisonment for debt." (Citation) p. 58, 59. The commentary also called attention to the lack of value of such a practice as a fund raising device. As was also documented in *James v. Strange*, 407 US 128 (1972), and is generally conceded, such practices are not meaningful revenue producers. There appears, therefore, to be no compelling state interest in maintaining the practice.

The intention of Oregon is not the overriding factor:

> "The question is not whether the chilling effect is unintentional rather than intentional, the question is whether the effect is unnecessary and therefore excessive." *U.S. v. Jackson*, 390 U.S. 570, 582 (1968).

It does, however, appear that Oregon's intention is to seek sanctions against those indigents who might request counsel. The statutes blatantly used the phrase *sentenced to pay costs.*

> "*Sentence.* The judgment formally pronounced by the Court or judge upon the defendant after his conviction in a criminal prosecution awarding the punishment to be inflicted. Judgment formally declaring to the accused legal consequences of guilt which he has confessed or of which he has been convicted. The word is properly confined to the meaning . . . " *Black's Law Dictionary,* Fourth Edition, 1951 p. 1528.

In this case, the Oregon Appellate Court stated at page 7:

> "We see no good reason why a defendant should have the right to refuse to . . . pay costs against him as a result of his own wrongdoing if in the future it is determined that his circumstances have changed so that he is able to pay."

It is interesting that the Court seems to consider as a cost of wrongdoing, not just the alleged criminal conduct, but the exercise of a constitutional right to receive fair treatment in the Oregon Courts. Further, the Court fails to recognize "that representation by counsel is desirable in criminal cases both from the viewpoint of the defendant and of society." *Argersinger v. Hamlin,* concurring opinion, Chief Justice Burger, 407 U.S. 25, 44.

One should be careful not to confuse what is occurring in criminal cases in Oregon with the awarding of costs in civil cases. The nature of criminal cases with the presumption of innocence, right to remain silent, right against self-incrimination and proof beyond a reasonable doubt standard clearly differentiates them from civil cases. In civil matters, communications and negotiations between the par-

ties usually take place before seeking legal remedies, and therefore most civil disputes are handled and settled without ever involving any part of the judicial process. On the other hand, criminal matters invariably automatically involves the judicial process. The issuance of a mere traffic ticket constitutes the filing of a criminal charge. Whether the title of the government's pleading be complaint, information, or indictment, the action almost automatically begins by involving the judicial process. Since the person charged, in reality, has little or no opportunity to avoid the judicial process, he should not be punished for being forced into it.

Further, if the State of Oregon considers this legislation to be merely awarding costs to the prevailing party, the state somehow forgot to make any provisions for making an award to those who are unwillingly forced to appear and defend themselves against criminal charges, and are not convicted.

B. ORS 161.665 and 161.675 Acts as a Deterrent To Effective Representation by Counsel

The right to counsel, *Gideon v. Wainwright*, 372 U.S. 355; 83 S.Ct. 792 (1963) includes the right to effective assistance of counsel, *Powell v. Alabama*, 287 U.S. 55 (1932). Effective counsel includes the use of investigators and other experts helpful in the preparation of the case. *Cornell v. Sup. Ct.*, 52 C2d 99 (1959); *Clifton v. Sup. Ct.*, 7 CA 3d 245 (1970) American Bar Association standards relating to "Providing Defense Services" § 1.5, American Bar Association standards relating to "The Defense Function" § 4.1.

For an attorney to effectively represent his client often he must use the services of an investigator or other expert, prepare various motions to protect his clients' in-

terest and possibly challenge whether the police or other representatives of the government acted within constitutional guidelines. Under ORS 161.665 and 161.675 the client would know that using investigators to find witnesses and the making of various motions may increase his costs should he be convicted. This could tend to deter accused individuals from giving information to their attorney that might require additional investigation or preparation by the attorney.

As anyone experienced in criminal trials is aware and as expressed in the commentary of the two ABA standards just cited, investigation is essential to proper representation. Proper preparation by the defense attorney through use of investigators and other experts is, of course, useful to the administration of justice in that only when the attorney is thoroughly informed can he properly advise his client as to a recommended course of conduct.

Investigators and experts are helpful not only to determine the guilt or innocence of the accused, but also to determine whether or not the accused may be guilty of a lesser crime.

After a firm determination as to the guilt of the accused, a need for an investigator or expert (such as a psychiatrist) may still exist. The role of an attorney does not cease upon a determination of guilt. The attorney has the responsibility of presenting his clients' case at the time of sentencing. Counsel may desire to show mitigating or extenuating circumstances with regard to the criminal acts; or perhaps present a psychiatric evaluation or recommendation to the court, so that the court may have at its disposal greater understanding of the defendant and various alternative methods of dealing with him. The Oregon practice places the attorney in the uncomfortable position of attempting to seek information that may result

in reducing the sentence, and at the same time, automatically increasing the sentence by increasing the costs to be imposed. A seemingly improper situation is created when proper representation is in itself counter-productive and harmful to the client.

Proper representation by counsel is not only beneficial to the client, but to society as well. It is in society's interest not only to convict the guilty, but to have the innocent acquitted, to make certain the conviction is of only the proper offense, and that any sentence imposed properly fits the circumstances surrounding the crime and the individual defendant.

II. ORS 161.665 AND ORS 161.675 IS CONTRARY TO THE RIGHT OF TRIAL BY JURY

ORS 161.665(2) does not permit costs to include "expenses inherent in providing a constitutionally guaranteed jury trial." However, the Oregon Court of Appeals decision in this case at page 3 interprets those costs as "a jury fee and the costs of summoning jurors."

Since the court interprets the costs of an attorney as a cost that can be charged, it is apparent that despite the exclusion of jury fees this legislation still has a chilling effect upon the right to trial by jury.

Should the accused desire to exercise the right to a jury trial on the issue of the criminal charge, he is likely to be charged a greater fee in that jury trials involve more of counsel's time than do court trials or pleas of guilty. Attorney's fees are customarily determined by the time expended in a given case.

There can be no condition placed upon the exercise of a constitutional right.

"It is a penalty imposed by courts for the exercise of a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Griffin v. State of California*, (1965) 380 U.S. 609, 614, 85 S.Ct. 1229, 1233).

It would be difficult to deny that a financial penalty would not have a chilling effect upon the accused seeking a trial by jury. An attorney would be negligent in his duties if he did not advise his client of the additional expense involved in a jury trial. Individuals faced with a decision whether or not to seek a trial by jury may therefore be discouraged from exercising their constitutional privilege of a jury trial.

In addition, charging for the exercise of the right to trial by jury is equivalent to increasing the punishment for requesting a trail by jury. Such a penalty is improper.

". . . we think it is clear that by increasing the penalty in the case of a defendant who chooses to rely on the presumption of innocence, to put the state to the test of proving its case, and to assert his right to a jury trial, one is in effect penalizing a defendant who asserts rights to which he is entitled." (*People v. Morales*, (1967) 252 CA 2d 537, 546.)

It appears that Oregon has recognized the problem of placing a burden upon *a constitutionally guaranteed jury trial*, but not of placing a burden upon the *constitutionally guaranteed right to counsel*, which right is necessary to give meaning to the *constitutionally guaranteed jury trial*.

III. THE OREGON STATUTORY SCHEME DENIES DUE PROCESS

The Oregon practice involves the taking of property (money) by the state. Therefore the requirements of due process must be met. The minimum requirements of due process are mentioned in *Goldberg v. Kelly*, 397 U.S. 54 (1970), a case involving pretermination hearings for welfare cases. Listing what was called "rudimentary due process" includes:

1. Timely & adequate notice;
2. The right to appear personally before the officer who will make the decision;
3. The right to present evidence;
4. The right to confront and cross-examine witnesses;
5. The recipient must be permitted to retain an attorney;
6. The decision must revolve upon the legal rules & the evidence adduced at the hearing;
7. The decision maker must be an impartial officer;
8. The decision maker must state the reasons for his determination;
9. The decision maker must indicate the evidence relied upon.

Timely and adequate notice would seem to require that upon the initial appearance in court, and prior to the appointment of counsel the accused must be advised he may be required to pay many of the costs involved in his prosecution. Before the assessment of any costs, the defendant should be advised what is the intended assessment

and what evidence will be relied upon to determine those costs. The Oregon scheme fails on both accounts. In addition the statute must be specific enough to properly place the defendant on notice as to how and whether an assessment will be made. The statute is much too vague as to any standards, leaving the assessment and the amount of assessment to the *uncontrolled* discretion of the judge.

The right to appear personally before the officer who will make the decision does not appear to be required by the statute. The costs under this statute could be assessed at a later date.

The right to confront and cross-examine witnesses is not a part of the statute.

The right to retain an attorney is not a part of the statute. While the defendant has an attorney representing him in the criminal matter, one would think that the attorney would be required to reduce any sanctions taken against his client to the greatest degree he is able; however, when the attorney is required to set a value on his own services and the services of an investigator whom he hires, there is such a clear conflict of interest that it is impossible to say that the attorney is in reality representing his client during any hearing under this statute. For example, if the defendant wanted to challenge the billing of the investigator whom the attorney hired, it would be difficulty for the attorney, without having a conflict of interest, to claim that he hired an investigator who would file a fraudulent claim. Or the defendant may desire to challenge what the attorney states is proper compensation, or the number of hours expended. If the attorney is not paid, is he to call this to the attention of the court and ask it to hold his own client in violation of probation? In effect the defendant is un-

represented, and the attorney-client relationship can be seriously strained.

There is no requirement in the statute that the decision of the judge rests solely upon legal rules and evidence adduced at the hearing. As a matter of fact, there is no provision for a hearing. The judge who hears the sentencing is not necessarily an impartial official. The judge may feel biased against the defendant because he was dissatisfied with the way the defendant testified; with the fact that the defendant fought the case, or for any multitude of other reasons. The sentencing judge is not necessarily the jurist who presided over all the proceedings concerning the criminal charge. Even if the sentencing judge did hear all the criminal proceedings, since he is not infallible, the rules of evidence should still be relied upon.

There is no requirement of the statute that the judge state the reasons for his determination.

There is no requirement in the statute that the decision-maker must indicate what evidence he relies upon in making the decision.

IV. CHARGING INDIGENT DEFENDANTS THE COST OF APPOINTED COUNSEL AS A CONDITION OF PROBATION DENIES EQUAL PROTECTION OF LAW.

A

The indigent accused who foregoes his constitutional right to counsel may be rewarded by receiving a lighter sentence than a similarly situated defendant who seeks representation by counsel. Those poor persons who seek fair treatment within the court system through representation by counsel are thereby established as a class of persons

apart, to receive special punishment. Those poor persons who either reject the basic concepts of the adversary system or fear the costs involved, and therefore turn down the offer of counsel receive less harsh treatment.

B

In Oregon, a non-indigent defendant who retains his own counsel, and has a dispute as to fees faces an entirely different situation from the indigent. The non-indigent can force his attorney to file a civil action for his services. A civil action, of course, would meet the dues process requirements of *Goldberg v. Kelly* (supra.). Those due process rules are not permitted the poor. The non-indigent also has a right to have a jury determine the issues.

Oregon Constitution Article I, § 17, "Jury Trial In Civil Cases":

> "In all civil cases the right to trial by jury shall remain inviolate."

The indigent, under the Oregon practice, has no right to have a jury determine a factual dispute as to fees due counsel.

C

The non-indigent defendant in a criminal case in Oregon who does not pay his privately retained attorney cannot be imprisoned for the failure to pay such counsel. Article I, Section 19, Oregon Constitution: "There shall be no imprisonment for debt, except in case of fraud or absconding debtors." However, under ORS 161.665 and ORS 161.675 an indigent defendant in a criminal case who is ordered to pay his court-appointed counsel as a condition of probation may be imprisoned for failure to pay such

counsel as a violation of the terms and conditions of such probation. If an indigent defendant may not be imprisoned for failure to pay a fine (*Tate v. Short*, 401 U.S. 395), surely an indigent should not be imprisoned for failure to pay the costs of his court-appointed counsel.

Respectfully submitted,

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January 8, 1974

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Dear Mr. Hartman:

I would be more than happy to have the NLADA file an amicus curiae brief in the case of Fuller vs. Oregon, Supreme Court Case No. 73-5280.

Very truly yours,

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January 24, 1974

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Re: Fuller v. Oregon, No. 73-5280

Dear Mr. Barish

Confirming our telephone conversation of January 24, 1974, I have no objection to your filing a brief as amicus curiae in the above case.

Sincerely

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cc: Michael Rodak, Jr.
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